



OFFICE OF THE ATTORNEY GENERAL
Mike Beebe

Board Members' Handbook

March 1, 2003

PREFACE

By law, the Attorney General of Arkansas is required to provide legal counsel to state agencies. Therefore, an Agencies Division is located in the Civil Department of the Attorney General's Office. It is staffed by attorneys who devote the majority of their time to representing various boards, agencies, and commissions. The goal of the Agencies Division is to provide consistent, top-quality legal counsel and representation to the agencies, boards, and commissions of the State.

So that our clients have easy access to current information and better representation, we have compiled this handbook for state agencies. Our purpose is to keep you better informed about the general operations of state agencies, the duties of your board and commission members, the obligations you have under the Freedom of Information Act and the Administrative Procedure Act, and your relationship with the Assistant Attorney General assigned to represent your agency.

Another goal of this handbook is to help make the operations of the various boards, agencies, and commissions more uniform. Of course, each of our clients is different and has its own unique needs and functions. However, it is in the best interests of all of us if general policies and procedures are similar, as that gives both state employees and the general public a better grasp of how state government works. A common objective of all state entities is to make government more accessible to our constituents. I hope that this handbook furthers that aim.

I hope that you find this handbook informative and useful. My staff and I look forward to a continued mutually satisfying attorney-client relationship as we try to assist you with any legal matters that arise.

Sincerely,

Mike Beebe

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I. THE ROLE OF THE ATTORNEY GENERAL IN ADVISING AGENCIES, BOARDS, AND COMMISSIONS

The State Agencies Division of the Civil Department of the Attorney General's Office is available to provide direct legal counsel to any state agency or officer and has designated attorneys to represent nearly 170 officers, agencies, boards, commissions, and institutions on a regular basis. This representation includes providing legal advice to these state entities concerning compliance with applicable laws, such as the Freedom of Information Act (FOIA) and the Administrative Procedure Act (APA).

The Attorney General's Office also is frequently called upon by state agencies to help present complaints by citizens against licensed and regulated professionals through disciplinary hearings before the various regulatory boards and commissions. The State Agencies Division's attorneys also participate in a prosecutorial role in disciplinary actions brought by the boards and commissions themselves. These attorneys also handle cases for their assigned agencies before the State Employee Grievance Appeal Panel, the Arkansas Claims Commission, and circuit courts throughout the state.

Attorney General Mark Pryor's Assistant Attorneys General were involved in over 300 administrative hearings in 2001. During that same year, these attorneys were involved in 69 appeals of agency-or-board decisions to circuit courts and 13 appeals that advanced to be heard by either the Arkansas Court of Appeals or the Arkansas Supreme Court. The Agency Division attorneys also participated in over 80 miscellaneous cases including small claims, Claims Commission, and jail closure proceedings and consent orders.

It is equally important to note that many times each day, the various state agencies, boards, and commissions call, write, or meet with their counsel at the Office of the Attorney General. They request formal and informal advice on the legal issues involved in their particular area of state government as well as on employment matters and employee rights. Therefore, each attorney representing an agency must be very familiar with the laws governing that particular agency and the issues frequently decided in the normal course of its business.

Additionally, during legislative sessions, these attorneys work with Attorney General Beebe's legislative team to analyze proposed legislation regarding agencies and administrative law. After new legislation is passed, the attorneys help their agencies understand and implement the new laws. Finally, these attorneys help the agencies they represent through the "rule and regulation process" required by the Arkansas Administrative Procedure Act. Each agency attorney is assigned to represent about 20 agencies, a challenging legal job.

The most important functions of these counselors are in helping state agencies prevent legal mishaps before final decisions are made and in facilitating resolution of agency disputes with citizens and governmental entities without having to resort to avoidable litigation. Attorneys in the State Agencies Division responded to thousands of agency inquiries each year.

Under Ark. Code Ann. §25-16-706, the Attorney General issues official Attorney General Opinions when an agency submits a formal written request. These official Opinions are produced by the Attorney General's Opinions Division under the Attorney General's direct supervision. An official Attorney General's Opinion is binding upon a

state agency in the sense that, if the agency does not follow the advice in the official Opinion, the agency and its members may have some additional legal exposure if the agency is then sued over the action taken. An official Attorney General's Opinion may differ from the advice given to an agency by its assigned legal counsel. An agency is advised to consult with its assigned legal counsel before requesting an official Attorney General's Opinion.

II. THE ROLE OF ADMINISTRATIVE AGENCIES IN GOVERNMENT

A fundamental principle of United States government requires that the executive, legislative, and judicial powers of government be exercised by separate branches of government, each of which has checks on the others. Administrative agencies occupy a unique place in government because they may exercise all three powers. An administrative agency is an entity within the executive branch. It also acts as a regulatory agent of the Legislature. Finally, it may exercise power similar to courts, including quasi-judicial powers over individuals. In the case of licensing boards, the Legislature has placed the power to regulate the specialized professions and vocations for which licenses are required in agencies made up primarily of persons who hold such licenses and, thus, are best prepared to regulate the profession. These specialists are complemented by public members, citizens who bring other backgrounds, knowledge, and experience to the activities of the boards.

Because administrative agencies combine the powers of all three branches of government, the very existence of early administrative agencies at first troubled the courts. Courts finally resolved this issue by recognizing that the danger to citizens' liberty is not in blended power itself, but in unchecked power. Two checks have been established for administrative agencies. First, only the Legislature may create agencies. The Legislature must declare a legislative policy and establish primary standards for agency actions. Thereafter, agencies are permitted only the authority to fill in details, through rules or adjudication, consistent with legislatively-determined policy. Second, the judiciary operates as a check by retaining authority to prevent and rectify abuses and to hear appeals.

For purposes of the Administrative Procedure Act, which governs rule-making and adjudications, an “agency” is defined as each board, commission, department, officer, or other authority of the state, whether or not within, or subject to review by, another agency. Entities that are not “agencies” for purposes of the APA include the General Assembly, the courts, the Governor, the Public Service Commission, the Commission on Pollution Control and Ecology, the Workers’ Compensation Commission, and the Employment Security Department. The definition includes certain other entities for purposes of administrative appeal. See Ark. Code Ann. §25-15-202(1)(A) & (B).

III. GENERAL ROLES AND RESPONSIBILITIES OF LICENSING BOARDS

As administrative agencies, licensing boards have only those powers expressly granted to them by the Legislature, as set forth in the statutes. Boards and commissions have implied powers only to the degree necessary to carry out the purpose of their legislation. Smith v. Refunding Board of Arkansas, 192 Ark. 145, 90 S.W.2d 494 (1936). The Freedom of Information Act, the Administrative Procedure Act, and the boards' individual practice acts are the principal statutes that define and limit the boards' responsibilities.

Licensing-board duties fall into three major categories: licensure; complaint resolution, including discipline; and rulemaking, which assists the boards in carrying out the other two principal duties. A discussion of licensure duties is found at page 32 of this handbook. Discussions of disciplinary investigations and hearings are found at pages 34 and 38 of this handbook. Finally, a discussion of rulemaking is found at page 48 of this handbook.

IV. ARKANSAS FREEDOM OF INFORMATION ACT

A. Introduction

The Arkansas Freedom of Information Act (“FOIA”) was passed in 1967 and significantly amended in 2001. The Act addresses the public’s access to both records and meetings, and the legislative intent expressed in A.C.A. § 25-19-102 clearly reflects a policy of openness. Section 25-19-102 states that “[i]t is vital in a democratic society that public business be performed in an open and public manner....” The Arkansas Supreme Court has ruled that the Act was passed “wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved.” Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968). Exemptions from the Act are to be narrowly construed. Under the narrow-construction rule, if the intent to provide an exception is doubtful, openness is the result. It is significant that there is no attorney-client privilege under the FOIA; thus, a board or commission cannot meet in private with its attorney.

The Arkansas Freedom of Information Handbook (10th Edition) provides a quick reference to the Act. For a more in-depth comprehensive treatment of the Act, see J. Watkins, Arkansas Freedom of Information Act (3rd ed. 1998). In addition, the Attorney General issues Opinions to state officials on any question pertaining to administration of the laws. Opinions are available at www.ag.state.ar.us. Finally, Acts 1259, 1336, and 1653 of 2001 should be reviewed for the most recent amendments to the FOIA.

B. Open Meetings

Arkansas Code Annotated § 25-19-106(a) provides that “Except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the

governing bodies of all municipalities, counties, townships, and school districts and all boards, bureaus, commissions, or organizations of the State of Arkansas except grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings.” Arkansas Code Annotated § 25-19-103(4) provides that “‘Public meetings’ means the meetings of any bureau, commission, or agency of the State, or any political subdivision of the state, including municipalities and counties, boards of education, and all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds.”

The “governing-bodies” language applies to all entities set out in § 25-19-106(a). “Governing bodies” are those with final decision-making or policy-making authority. The Act covers “all meetings, formal or informal, special or regular.” This includes unofficial meetings for information gathering. An unofficial group meeting of less than a quorum of the governing body is subject to the FOIA if the meeting is called for the purpose of discussing any matter on which foreseeable action might be taken by the governing body. Mayor of El Dorado v. El Dorado Broadcasting Co., 260 Ark. 821, 544 S.W.2d 206 (1976). There does not need to be any official action for a “meeting” to occur. Telephone conferences are permissible, if conducted in accordance with the Act; however, telephone polls are impermissible. Social gatherings before or after regular meetings may raise questions; but there will be no “meeting” under the FOIA as long as any discussion of public business is intermittent and incidental to the social function. Op. Att’y Gen. 95-020.

Section 25-19-106(b) sets forth the notice requirements for meetings. The time and place of each regular meeting must be furnished to anyone who requests it. A.C.A. § 25-19-106(b)(1). Notice of regular meetings is not required if not requested. See Elmore v. Burke, 337 Ark. 235, 987 S.W.2d 730 (1999). In the case of emergency or special meetings, at least two hours' notice must be provided to county news media that have requested it and to non-county news media that cover regular meetings and that have requested it. A.C.A. § 25-19-106(b)(2). There is no requirement that the general public be notified of emergency or special meetings. Failing to give notice, or otherwise holding a meeting in violation of the Act, may result in the invalidation of the meeting.

Arkansas Code Annotated § 25-19-106(c)(1) states “[e]xecutive sessions will be permitted only for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee. The specific purpose of the executive session shall be announced in public before going into executive session.” Executive sessions may be held only to consider personnel matters concerning individual officers or employees. See Ops. Att’y Gen. 87-080 and 91-070; Commercial Printing Company v. Rush, 261 Ark. 468, 549 S.W.2d 790 (1977). Boards and Commissions can meet in executive session for purposes of preparing examination materials and answers to examination materials that are administered to applicants for licensure. They are also exempt from the FOIA when administering those examinations. A.C.A. § 25-19-106(c)(5) (Supp. 2001).

An executive session may deal with a specific salary issue involving a specific individual, but not broad salary issues or blanket hiring of personnel. An executive session may be held to review applications and develop a list of applicants to interview,

assuming that the meeting is held to consider individual applicants. The same notice requirements apply as in the case of open meetings. See Op. Att’y Gen. 90-239. The public body must convene in public to announce the specific purpose of the executive session prior to retiring. A.C.A. § 25-19-106(c)(1). There is no requirement that the name or position of the individual be identified. See Op. Att’y Gen. 91-070. But when the body reconvenes for a vote, the name of the person and/or position discussed in the executive session must be disclosed. *Id.* Under § 25-19-106(c)(2)(A), only the person holding “the top administrative position, ... the immediate supervisor of the employee involved, and the employee” may be present “when so requested by the governing body....” [Emphasis added.] And, under § 25-19-106(c)(2)(B), “[a]ny person being interviewed for the top administrative position” may be present “when so requested by the governing board....” [Emphasis added.] Under § 25-19-106(c)(4), “[n]o resolution, ordinance, rule, contract, regulation, or motion considered or arrived at in executive session will be legal” unless the public body reconvenes and votes on the matter. Executive sessions must never be called to defeat the reason or spirit of the FOIA. A.C.A. § 25-19-106(c)(3).

C. Public Records

Arkansas Code Annotated § 25-19-103(5)(A) provides that “‘Public records’ means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employees, a governmental agency, or any other agency wholly or partially supported by public funds or expending

public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.” The “Arkansas Freedom of Information Act,” contrary to its name, provides access not to “information,” but to “public records.” An entity to which the Act applies is not required to create a new record or compile information in response to an FOIA request. A.C.A. § 25-19-105(d)(2)(c) (Supp. 2001). It must merely provide access to “public records” unless they are exempt from the Act. Beginning July 1, 2003, a substantial number of materials must be made publicly accessible, without charge, in an electronic form via the Internet. A.C.A. § 25-19-108(b)(1) (Supp. 2001).

The definition of “public records” is extremely broad and applies to electronic or computer-based information. Public records, however, does not mean software acquired by purchase, lease, or license. The definition of public records can also apply to a tape recording of a public meeting, but not to a tape of an executive session. The definition applies to any record “required by law to be kept or otherwise kept, and which constitutes a record of the performance or lack of performance of official functions....” If the record is not required by law to be kept, it must be both “otherwise kept” and constitute a record of the performance or lack of performance of official functions. The definition includes all records in the possession of public agencies, including records generated by third parties.

The definition of “public records” can also apply to records held by private entities, if they are “wholly or partially supported by public funds or expending public funds.” City of Fayetteville v. Edmark, 304 Ark. 179, 801 S.W.2d 275 (1990). Only documents of the private entity, related to the governmental work, however, are subject to

the FOIA. (The receipt of public funds does not subject every record of the private entity to the FOIA.) Edmark, supra. Where records are established to be nonexempt “public records,” the appropriate governmental agency shall have the responsibility to provide access, even though it is not in actual or constructive possession of the documents at the time of the request (e.g., where the records are in the hands of a private contractor with the public agency). See Swaney v. Tilford, 320 Ark. 652, 898 S.W.2d 462 (1995).

The Act requires that records be “open to inspection and copying.” The request may be made in person, by telephone, by mail, by facsimile transmission, by electronic mail, or by other electronic means provided by the custodian. The request must be sufficiently specific to enable the custodian to locate the records with reasonable effort. A.C.A. § 25-19-105(a)(2)(C) (Supp. 2001).

The Act grants access to “citizens” of the State of Arkansas. Residents of other states or countries are not generally entitled to access under the Act (although it may be a small matter for them to have an Arkansas citizen make the request on their behalf). Corporations doing business in the State can be “citizens.” See Arkansas Highway & Trans. Dept. v. Hope Brick Works, Inc., 294 Ark. 490, 744 S.W.2d 711 (1988).

The Act requires access during “regular business hours” of the custodian. Presumably this refers to the hours the agency is open for business. It has been held that where a police department operated 24 hours a day, seven days a week, those were its regular business hours for purposes of the FOIA. Hengel v. City of Pine Bluff, 307 Ark. 457, 821 S.W.2d 761 (1991). Upon request and payment of a fee, the agency must provide copies of the records if it has the necessary duplicating equipment. Except as provided by law, the fee will not exceed the actual cost of reproduction. An agency

cannot charge for an employee's time in searching, reviewing, retrieving, or copying records. The custodian may also charge the actual costs of mailing or transmitting the record by facsimile or other electronic means. If the estimated fees exceed twenty-five dollars, the custodian may require the requestor to pay that fee in advance. The agency will provide an itemized breakdown of these charges. A.C.A. §25-19-105(d) (Supp. 2001).

The FOIA contemplates immediate access, or access as quickly as the records can be retrieved, unless the records are in "active use or storage." The custodian must certify in writing the fact that the records are in active use or storage and set a time within three working days to make the records available. In some cases, however, compliance immediately or in three days may be impossible due to the voluminous nature of the request or the need to consult legal counsel. The Attorney General has opined in such cases that a "reasonable time" should be afforded to comply with the request. Op. Att'y Gen. 94-225.

Special circumstances may also apply to certain requests for electronic information. A custodian, at his or her discretion, may agree to summarize, compile, or tailor electronic data in a particular manner or medium and may agree to provide the data in an electronic format to which it is not readily convertible. Where the cost and time involved in complying with such a request is relatively minimal, the custodian should agree to provide the data as requested. In addition to the standard copying costs, the custodian may charge the actual, verifiable costs of personnel time exceeding two hours associated with the task. The charge for personnel time may not exceed the salary of the

lowest paid employee or contractor who, in the discretion of the custodian, has the necessary skill and training to respond to the request. A.C.A. § 25-19-109 (Supp. 2001).

As previously discussed, Arkansas Code Annotated A.C.A. § 25-19-105(a) provides: “Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection....” This subsection refers to the specific exemptions contained in subsection (b) of the statute, and contains a “catchall” exemption, which incorporates “specific” exemptions contained in any other law. The subsection uses the word “specifically,” when referring to the subsection (b) exemptions and the “catchall” exemption, which indicates that exemptions are to be construed narrowly. As discussed below, if records contain both exempt and nonexempt information, the exempt information must be excised or deleted, and the remainder of the record made available.

A few of the frequently used exemptions listed in subsection (b) are as follows:

- (1) **Medical records, adoption records, and education records as defined in the Family Educational Rights and Privacy Act of 1974.**
- (2) **Undisclosed investigations by law-enforcement agencies of suspected criminal activity.** Only records of investigations of “law-enforcement agencies” are eligible for the exemption. Many times, records of public agencies that would otherwise be subject to disclosure become a part of a criminal investigation. As long as the investigation is “ongoing,” the records are exempt, even if requested from the non-law-enforcement agency. Ops. Att’y Gen. 92-237, 91-323, and 91-100.

- (3) **Unpublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, Court of Appeals Justices, and the Attorney General.** The Attorney General has opined that “correspondence of” applies to both letters received by those officials and copies of letters written by them. Op. Att’y Gen. 93-166. It does not include letters written by these officials, however, when in the hands of other agencies subject to the FOIA. See Op. Att’y Gen. Nos. 2000-172, 93-166, and 95-128, n. 1.
- (4) **Documents that are protected from disclosure by order or rule of court.**
- (5) **Files, which if disclosed, would give advantage to competitors or bidders.**
- (6) **Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy.** Most “personnel records” are open to public inspection. It is only “to the extent” that their release would constitute a “clearly unwarranted invasion of personal privacy” that records may be exempted or information excised from otherwise disclosable records. A determination must first be made that particular records are indeed “personnel records” and not “employee-evaluation or job-performance records.” (A different test is applied to the latter.)
- (7) **Certain records concerning security of computers or computer systems.**

(8) **Home addresses of non-elected state employees contained in employer records.**

(9) **Examinations and Answers.** Materials, information, examinations, and answers to examinations used by boards and commissions for purposes of testing applicants for licensure.

Unlike “personnel records,” “employee-evaluation or job-performance records” are shielded from public view except when four specific factors are present. “Employee-evaluation or job-performance records” can include such things as letters of resignation, letters of reprimand, documents upon which disciplinary action is based, and investigation records of employee misconduct, as well as standard employee evaluations. See Ops. Att’y Gen. 93-356, 93-055, 92-319, and 92-310. Such records can be released only upon final administrative resolution of any suspension or termination proceeding where the records formed a basis for the decision to suspend or terminate, and there is a compelling public interest in their disclosure. Final administrative resolution means the final step or appeal process the employee is entitled to take within the agency, or the passage of the deadline for that final step. See Op. Att’y Gen. No. 98-006.

It should be noted that a request for personnel or employee-evaluation or job-performance records triggers certain notice requirements. If an agency receives a request for such records, the custodian must decide within 24 hours whether the records are releasable or exempt from disclosure. (Many times, the custodian will need to consult counsel to make this determination.) He or she must then notify the requester and the subject of the records of that decision. The notice can be by phone or in person within the 24-hour period. If this notice cannot be accomplished, the custodian must send

written notice by overnight mail to the subject of the records. (If a request covers more than one or many employees, the notice requirement can be quite cumbersome.)

Any one of three people (the custodian, the requester, or the subject of the records) may “immediately” request an Attorney General’s Opinion on whether the custodian’s decision is consistent with the FOIA. These Opinions must be issued within three working days, and release of the records must be held in abeyance pending issuance of an Opinion. This three-day Opinion procedure applies only when personnel- or job performance records are at issue. It is not available when the requested records do not fall within this category.

An agency cannot deny a request to inspect a public record because information exempt from disclosure is commingled with nonexempt information. The agency must delete the exempt information and provide any reasonably segregable portion of a record with an indication of the amount deleted on the released record. The cost of separating exempt from nonexempt information is the agency’s responsibility. A.C.A. § 25-19-105(f) (Supp. 2001)

D. Penalties and Enforcement

The Freedom of Information Act establishes both criminal and civil penalties for violation of its provisions. Arkansas Code Annotated 25-19-104 provides that “Any person who negligently violates any of the provisions of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than two hundred dollars (\$200) or thirty (30) days in jail, or both, or a sentence of appropriate public service or education, or both.” This provision is rarely used. Cases pursuant to this provision must be brought by the prosecuting attorney. Arkansas Code Annotated 25-19-107 provides

for an appeal of a denial of FOIA rights to the appropriate circuit court. If an improperly conducted public meeting is being challenged, the plaintiff must give the governing body an opportunity to correct the violation. The Act provides for the circuit court to “fix and assess a day the petition is to be heard within seven (7) days of the date of the application ... and to hear and determine the case.” Section 5-54-121 of the Arkansas Code is a criminal provision, which prohibits making a false entry in, or false alteration of, any public record, or erasing, obliterating, removing, destroying, or concealing a public record, each with the knowing purpose of impairing the verity, legibility, or availability of the record. Tampering with a public record is a felony.

V. COMPOSITION OF BOARDS AND CONDUCT OF MEETINGS

A. Enabling Statutes and Appointment of Members

Each board's enabling legislation sets forth the qualifications for board members. Typically, a board's membership will include persons knowledgeable in the matters that are the subject of the board's responsibilities, members of the profession, and members of related professions if the board is a professional licensure board, and members of the general public who can add a consumer's perspective to the board's decisions. Board members typically are appointed by the Governor and serve terms of specific duration as stated in the enabling legislation. If the Governor does not immediately appoint a replacement for a board member whose term technically has expired, that board member may continue to serve on the board until a replacement is appointed. Constitution of Arkansas, Art. 19, §5. This practice is commonly referred to as "holding over."

B. Officers

Every board has officers who are elected, appointed, or designated by statute. Some statutes specify the titles that the board's officers will hold; in other cases, the board chooses those officers and their titles and functions. Generally, unless otherwise specified by enabling legislation, most boards elect officers on a yearly basis.

C. Rules of Procedure

Other than the procedures specified in the Administrative Procedure Act for rulemaking and adjudications, most boards' enabling statutes do not contain a great deal of detail regarding procedures to be used by the board in conducting its business. Some boards in Arkansas use Robert's Rules of Order as a guideline, though it is not required by statute.

D. Quorum and Voting

A quorum is the number of board members required to be able to conduct business legally. Some boards' enabling statutes specify the number of the board's members that must be present to constitute a quorum. Other boards' enabling statutes may require that a certain composition of board members must be present to make a quorum. If your board's statute does not specify the requirements for a quorum, then a simple majority of the members of the board will constitute a quorum. If a quorum is not present, the board cannot conduct business. If a quorum is lost during a meeting because a board member leaves the meeting for any reason, then no business can be conducted until a quorum is reestablished. If you have questions about obtaining and maintaining a quorum, you should consult your agency attorney.

As a general rule, action may be taken by a majority of members present, so long as a quorum exists. Benton County Taxpayers Ass'n, Inc. By and Through Evans v. Bolain, 252 Ark. 472, 479 S.W.2d 566 (1972); Mad Butcher, Inc. v. Parker, 4 Ark.App. 124, 628 S.W.2d 582 (1982).

VI. CONDUCT AND COMPENSATION OF BOARD MEMBERS

A. Attendance, Per Diem, and Reimbursement

In order to remain on the board, each member is expected to perform his duty as a board member and to attend meetings regularly. If a board member does not attend regularly, under certain conditions the Governor can remove him from the board. Arkansas Code Ann. §25-17-211 (Supp. 2001) states that if a board member has unexcused absences from three successive regular meetings, without attending any intermediary called special meetings, he can be removed from the board. Arkansas. Code Ann. §25-16-804 (Supp. 2001) has been amended to make clear that the removal for failure to attend board meetings or other good cause as defined in that section is applicable to all board and commission members appointed by the Governor. Members may be authorized to receive a stipend and reimbursement of expenses pursuant to A.C.A. § 25-16-901 *et seq.*

B. Ethics and Gifts

No member of a state board or commission can use or attempt to use her official position to secure unwarranted privileges or exemptions for herself or others. Ark. Code Ann. § 21-8-1002 (Supp. 2001); see also Ark. Code Ann. § 21-8-304 (Supp. 2001). The penalty for such behavior is removal from office, Ark. Code Ann. § 21-8-1004 (Supp. 2001). In addition, pursuant to Ark. Code Ann. § 21-8-801 (Supp. 2001), no member of a state board or commission may receive a gift or compensation, other than income and benefits from the governmental body to which he or she is duly entitled, for the performance of the duties and responsibilities of his or her office or position. A gift is generally defined as any payment, entertainment, advance, services, or anything of value,

unless consideration of equal or greater value has been given therefor. Ark. Code Ann. § 21-8-402 (Supp. 2001). The term gift, however, does not include anything with a value of one hundred dollars or less. Ark. Code Ann. § 21-8-402 (Supp. 2001). The Arkansas Ethics Commission is statutorily invested with the power to issue advisory opinions on questions regarding the foregoing statutes.

C. Criminal Offenses

Several criminal statutes address corruption in public office. Arkansas Code Ann. §5-52-101 (Repl. 1997) defines the offense of trading in public office as the solicitation, acceptance, or agreement to accept on behalf of any person, political party, or other organization any benefit from another person upon an agreement or understanding that the other person will, or may be, appointed a public servant or designated or nominated as a candidate for public office. Trading in public office also occurs when a person offers, confers, or agrees to confer any benefit, the receipt of which is prohibited by this code section. Trading in public office is a Class A misdemeanor.

Arkansas Code Ann. §5-52-102 (Repl. 1997) addresses the crime of unlawful compensation for past official action. This crime is committed if a person solicits, accepts, or agrees to accept, any benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another or for having otherwise exercised his discretion in favor of another. It is also committed if a person offers, confers, or agrees to confer any benefit upon a public servant, the receipt of which is prohibited by § 5-52-102. It is not a defense that the decision, opinion, recommendation, vote, or use of discretion, except for the benefit, was otherwise proper. This crime is a Class A misdemeanor.

Arkansas Code Ann. §5-52-103 (Repl. 1997) states that a person commits public-servant bribery if he offers, confers, or agrees to confer any benefit upon a public servant as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant; or if he solicits, accepts, or agrees to accept any benefit, the conferring of which is prohibited by this section. Public-servant bribery is a Class D felony.

A person commits the offense of soliciting unlawful compensation if he requests a benefit for the performance of an official action as a public servant knowing that he is required to perform that action without compensation, other than authorized salary or allowances, or at a level of compensation lower than that requested. Soliciting unlawful compensation is a Class A misdemeanor. See Ark. Code Ann. §5-52-104 (Repl. 1997).

A person commits the offense of attempting to influence a public servant if he threatens violence or economic reprisal against any person or uses deceit with the intent to alter or affect the public servant's decision, vote, opinion, or action concerning any matter that afterwards is to be considered or performed by him or the agency or body of which he is a member. This is a Class A misdemeanor under Ark. Code Ann. §5-52-105 (Repl. 1997).

A public servant commits the offense of misuse of confidential information if, in contemplation of official action by himself or a governmental unit with that he is associated or in reliance on information to which he has access in his official capacity and which has not been made public, he: (1) acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; or (2) speculates or aids another to speculate on the basis of this

information. Misuse of confidential information is a Class A misdemeanor under Ark. Code Ann. §5-52-106 (Repl. 1997).

Ark. Code Ann. §5-52-107 (Repl. 1997) addresses the crime of abuse of office. This offense is committed when a public servant knowingly commits an unauthorized act that purports to be an act of his office or omits to perform a duty imposed on him by law or clearly inherent in the nature of his office, if done with the purpose of benefiting in a pecuniary fashion himself or another person or of harming another person. This is a Class B misdemeanor.

D. Conflicts of Interest

Ark. Code Ann. §21-8-1001 (Supp. 2001) prohibits a member of a state board or commission from participating in, voting on, influencing, or attempting to influence an official decision if the member has a pecuniary interest in the matter under consideration by the board or commission. However, that does not apply if the only pecuniary interest he may have is incidental to his position or accrues to him as a member of a profession, occupation, or large class to no greater extent than the pecuniary interest could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class. No member of a state board or commission may participate in any discussion or vote on a rule or regulation that exclusively benefits that member. The penalty for such behavior is removal from office, Ark. Code Ann. §21-8-1004 (Supp. 2001). For a general discussion of conflicts of interest for board members, see Arkansas Attorney General Opinion No. 93-446.

The Arkansas Supreme Court discussed different types of bias in Arkansas Racing Commission v. Emprise Corp., 254 Ark. 975, 497 S.W.2d 34 (1973). Some types

of bias require disqualification of a board member, while some do not. A preconceived point of view about issues of law or policy is not the kind of bias that requires disqualification. Bias or prejudgment concerning issues of fact about the parties in a particular case can be cause for disqualification if the bias is strong enough. An attitude for or against a party is ground for disqualification when it is strong enough. Finally, personal interest (i.e., standing to gain or to lose by a decision) is a ground for disqualification if the interest is strong enough. The court stated that an officer or board member is disqualified any time “there may be reasonable suspicion of unfairness.” Emprise, 254 Ark. at 981. Administrative agency adjudications are subject to the same “appearance-of-bias” standard that is applicable to judges. Id.; Madden v. U.S. Assoc., 40 Ark.App. 143, 844 S.W.2d 374 (1992); Wacaser v. Insurance Commissioner, 321 Ark. 143, 900 S.W.2d 191 (1995).

E. Confidentiality

No member of a state board or commission shall disclose confidential information acquired in the course of the member’s official duties, or use such information to further his personal interests. Ark. Code Ann. §21-8-1003 (Supp. 2001). The penalty for such behavior is removal from office. Ark. Code Ann. §21-8-1004 (Supp. 2001).

F. Nepotism

Ark. Code Ann. §21-8-101 (Repl. 1996) provides that a person who is related within the second degree, by blood or marriage, to a member or employee of a state board or commission shall not be eligible for appointment as a member of the board. In computing the degrees of relationship between any two kinsmen, it is proper to start with the common ancestor of the kinsmen and count downward. For example, a person and

his nephew are related in the second degree, for the nephew is two degrees removed from his grandparent, who is the common ancestor. *See* Ark. Code Ann. §28-9-212 (Supp. 2001).

Also, a person so related to a member of a state board or commission shall not be eligible for employment by the board or commission. This section applies only to persons hired or appointed after July 28, 1995.

G. Financial Disclosure Forms

The law requires each public appointee to any board or commission to complete a financial disclosure form under oath every year. This form is designed to reveal a board member's financial interests so that possible conflicts of interest can be identified. These forms can be obtained from the Secretary of State's Office, and they must be filed by January 31 of every year. New board members also must file one of these forms within 30 days after appointment to the board. There are other reporting requirements as well in certain instances. These requirements can be found in Ark. Code Ann. §§21-8-701 *et seq.* You can get more information from your agency attorney.

VII. LIABILITY/IMMUNITY OF BOARDS AND MEMBERS

A. General Principles

Board and commission members are officers of the State of Arkansas, and, for most purposes, employees and officers of the State enjoy sovereign immunity. This means that they are not personally liable for any damages that may come about as a result of their official actions. Article 5, Section 20 of the Arkansas Constitution states that “[t]he State of Arkansas shall never be made defendant in any of her courts.” This statement also applies to state employees acting in their official capacity. Except to the extent they are covered by liability insurance, state employees and officers are explicitly declared to be immune from personal liability from lawsuits under the provisions of Ark. Code Ann. §19-10-305 for damages for acts or omissions (other than “malicious acts or omissions”) occurring within the course and scope of their employment. However, state officers can be sued in their official capacity for certain types of relief, including injunctive relief.

Notwithstanding the above provisions regarding immunity, if a board or commission member or employee is served with process in any litigation, he must notify the Attorney General immediately in order to allow the Attorney General to file an appropriate pleading with the court. As a rule, the Attorney General will represent board and commission members and employees in litigation resulting from acts or omissions during the course and scope of their official duties or responsibilities. The State will not pay for private attorneys to represent state officers or employees in such litigation unless the Attorney General has declined to represent that individual and the officer or employee acted without malice and in good faith. A.C.A. § 21-5-801 *et seq.* The officer or

employee must file a claim with the Arkansas State Claims Commission to request reimbursement of any attorney fees incurred and/or judgment entered against him or her for actual damages. The State cannot reimburse anyone for an award of punitive damages.

B. Tort Claims

Sovereign immunity as granted by the Arkansas Constitution and Ark. Code Ann. §19-10-305 applies to tort claims as well. However, a state officer may be liable in his personal capacity if he acted or failed to act out of malice. For this reason, board members should always carefully consider whether they are influenced by any personal bias or motive when taking board action that will deprive another person of a property interest.

C. § 1983 Actions

Just as the state's Constitution grants sovereign immunity to the State from lawsuits in state court, the Eleventh Amendment to the United States Constitution removed the jurisdiction of the federal courts over suits filed against the states by citizens. Absent a state's consent to being sued or a specific waiver of sovereign immunity, the Eleventh Amendment acts as an absolute bar to suits against a state or state official in federal court. An exception to this general principle is 42 U.S.C. §1983, a statute allowing a person to sue when deprived of a life, liberty, or property interest under color of state law. That statute cannot be used to file suit against the state, but it can be used to file a lawsuit against an individual employee or member of a state board or commission. However, there is a doctrine called "qualified immunity" that shields a state officer from individual liability when his "conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known.” Buckley v. Fitzsimmons, 509 U.S. 259, 267, 125 L.Ed.2d 209, 113 S.Ct. 2606 (1993); *see also* Latimore v. Widseth, 7 F.3d 709 (8th Cir. 1993), *cert. denied* 114 S.Ct. 1124, 127 L.Ed.2d 433 (1993).

D. Defamation

While state officials and board members enjoy the immunities described above, it is important to make sure that an individual board member does not commit the civil tort of defamation. A private figure can only recover damages against an officer of the state if the defamatory statement goes beyond that allowed by the officer’s qualified privilege. A statement may exceed the scope of the privilege if it was not reasonably related to the subject matter of the official proceeding; if the statement was not made for the purpose of furthering the board’s interest in the proceeding; if the content of the statement or the extent to which the statement was published was more than necessary to further the board’s interest in, or discharge the board’s duty with respect to, the proceeding; if the statement was made out of hatred, ill will, or a spirit of revenge; or if the official published the statement with a lack of belief in its truthfulness. AMI 409. A statement is defamatory if it is a statement of fact that is false and actually causes harm to a person’s reputation. AMI 410. If you have any questions about defamation, you should consult your board’s attorney.

VIII. DUE PROCESS REQUIREMENTS—GENERALLY

The due process clause is found in the Fourteenth Amendment to the U.S. Constitution. It states that “No State shall . . . deprive any person of life, liberty, or property without due process of law. . . .” A legal turning point in agencies’ dealings with persons came when the courts held that a professional license was a property right to which the Fourteenth Amendment applied. Since that decision, courts have continually reviewed procedures used by licensing boards in dealing with the property rights of applicants or licensees. An applicant also has a liberty right under the due process clause associated with the right to be a member of a profession, barring some legitimate and non-arbitrary reason to deny licensure. Schwartz v. Board of Bar Examiners, 353 U.S. 232 (1957).

Additionally, the Constitution of the State of Arkansas contains a due process clause prohibiting any person from being deprived of his life, liberty, or property without due process of law. Arkansas Constitution, Art. 2, § 21.

Due process primarily affects the adjudicatory functions of a licensing board. A board acts in its adjudicatory capacity whenever it reviews the activities of a particular individual or party, makes determinations of fact and law based upon such a review, and issues an order affecting that specific individual or party. An individual is entitled by law to a hearing before a board makes findings of fact or issues an order affecting the party’s activities granted with a license. A board member cannot make up his mind about an issue affecting a party’s rights before a full and fair hearing is held. See, e.g., Arkansas Racing Commission v. Emprise Corp., 254 Ark. 975, 497 S.W.2d 34 (1973). If a board member is biased, he should disqualify himself, and a special board member can be

appointed by the Governor if necessary to achieve a quorum to hear the matter. Ark. Code Ann. §25-16-805.

Boards must take great care in the way they enforce their responsibility. The requirements of procedural due process are contained in court interpretations of the United States and Arkansas Constitutions, the Administrative Procedure Act, and in some statutes and rules. Although some of the requirements may seem technical, the reasons behind them ensure fundamental fairness. The law also requires that the boards be bound by certain substantive requirements in establishing jurisdiction, interpreting legal standards that apply to licensees, and imposing remedies or sanctions. Courts may review actions of all boards to determine whether or not the boards complied with due process requirements, acted within their jurisdiction, and interpreted the governing law reasonably.

The main criteria for meeting due process requirements include proper notice of hearing and other agency actions, the right to a hearing before an impartial tribunal, the right to counsel, and the right to confront witnesses. These elements are discussed in more detail in this Handbook in the discussion on hearings found at page 38.

IX. LICENSURE PROCEEDINGS

A board is given licensing authority to ensure that only those persons who are qualified may practice a profession. A board's exercise of its licensing function ensures that non-qualified applicants do not become licensed in a profession. The Legislature has decided that individuals are "qualified" for licensure by satisfying the legislative requirements for licensure found in every board's practice act. A board must make sure that an applicant is not denied a license for an arbitrary or discriminatory reason in violation of the Fourteenth Amendment's due process clause. Schwartz v. Board of Bar Examiners, 353 U.S. 232 (1957).

As opposed to the disciplinary function of a board, which largely is discretionary, the licensing function of a board is primarily "ministerial" in nature. A "ministerial" act is one that involves executing fairly specific standards that allow for little interpretation by a board. The Legislature has already determined those persons qualified to practice a profession by setting out specific education and experience requirements. If those criteria are met, a board may not deny licensure, except as set out below. In this way, the Legislature has required a board to license particular persons, while withholding licensure from others.

Even though the licensing function of a board is largely ministerial, a board can and does exercise a certain degree of discretion in connection with its licensing function. First, while a board's practice act sets out those mandatory requirements for licensure, the act will also allow the board to adopt rules to implement board functions. Accordingly, even if a practice act has a mandatory examination requirement, the board has discretion in implementing this requirement by defining in its rules certain aspects of that

requirement, such as the nature and scope of the examination or a cut-off score for passage. In this way, a licensing board is allowed certain discretion in carrying out its licensing function.

Second, most practice acts require that applicants be “of good moral character” or that they not have “engaged in conduct warranting disciplinary action.” These licensure requirements afford boards some discretion because a board must decide how the statutory criteria apply to each applicant for licensure.

For purposes of the Administrative Procedure Act, “license” is defined as any agency permit, certificate, approval, registration, charter, or similar form of permission required by law. “Licensing” is defined as any agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, or amendment of a license.

Ark. Code Ann. §25-15-211 applies when the grant, denial, or renewal of a license is required by law to be preceded by notice and an opportunity for hearing. See page 38 *et seq.* regarding the rules to be followed for notice and hearing in such instances. An agency can summarily suspend a license if the public health, safety, or welfare imperatively requires emergency action. You should consult your attorney before attempting a summary suspension.

X. DISCIPLINARY INVESTIGATIONS

A. Complaints

A licensing board's receipt of a complaint is the first event in the complaint process. Most complaints consist of a statement of grievances or accusations against a licensee and a request or demand for board intervention. A complaint may be submitted orally or in writing. Before an oral complaint is resolved, however, board staff or the complaint panel may require that the complaint be stated in writing. Note that a board's enabling legislation may require that the complaint be presented in a certain form. Complaints may be submitted by anyone, including a board member or board staff, or Attorney General staff.

B. Procedure after Complaint Receipt

Once the complaint is received, it must be determined whether the board has jurisdiction over the complaint. The board has jurisdiction if the complaint alleges or implies a violation of a statute or rule that the board is empowered to enforce. Thus, jurisdictional determinations relate exclusively to whether a board has the legal authority to act, relative to the facts presented by the particular complaint. Whether a complaint is true or can be proven is not relevant to the determination of jurisdiction.

Preliminary jurisdictional determinations normally may be made by the board's executive director or the complaint committee. The board's attorney may be consulted if necessary. Investigation usually is not required to determine jurisdiction, but sometimes limited investigation is necessary to get enough facts to determine whether the board has jurisdiction over the complaint. On occasion, a board will receive a multi-jurisdictional complaint, involving practitioners licensed by several boards or involving facts that may

imply jurisdiction by more than one board. In such cases, the boards with jurisdiction over the complaint should exchange information so that all the boards involved can properly investigate the complaint.

Complaints that are determined to be non-jurisdictional are dismissed by the board and, when possible, referred to other agencies that may have jurisdiction. Examples of complaints dismissed as non-jurisdictional include those that allege a licensee's commission of a crime not related to the licensee's practice; the licensee's discriminatory conduct against his employee; or a licensee's offensive personality.

C. Complaint Committee

A licensing board may establish a complaint committee if sufficient staff to whom such responsibility can be delegated is unavailable. The committee normally consists of a board member and the executive director, advised by the board's attorney. The committee, in addition to assisting the executive director in making jurisdictional determinations, may also make recommendations about how best to pursue a complaint. Options typically include requesting the licensee's written response to the complaint, referring the matter for investigation, referring it to a consultant for expert advice, scheduling a disciplinary conference or educational meeting with the licensee, or determining that the complaint is totally without merit. A board member who has had a financial or professional relationship with the subject of a complaint may be prohibited from participating in complaint-committee activities involving that licensee. A discussion of disqualifications appears on pages 24-25 of this handbook.

D. Investigation of a Complaint

Complaints may be investigated by the board's executive director, its employees, board members, or an investigator hired to perform the task. The board's attorney should not be involved in the investigation itself. During the investigation of a complaint, initial contacts usually are made with the complainant and other persons who will need to be interviewed. These contacts may be made by letter or by telephone. Documents are obtained via request, authorization, subpoena, or Freedom of Information Act request to other public agencies. If the board has the authority to issue subpoenas in investigations, a subpoena for testimony may need to be obtained for a witness who wishes to be interviewed pursuant to a subpoena.

In-depth interviews of the complainant and other witnesses generally are necessary. These interviews are pre-arranged for a specific time and date, whether the interview is in person or by telephone. Verbal consent to be interviewed is obtained from each interviewee. A description of the complaint-resolution process is presented to the witness. Interviews are conducted using open-ended questions designed to elicit a narrative response.

After witnesses are interviewed and acquired documents are reviewed, an interview with the licensee who is the subject of the investigation may be necessary. The licensee may be contacted by telephone, in person, or by letter and advised of the complaint. If interviewed, the licensee is informed that he or she may have counsel present during the interview.

E. Reasonable Cause

Upon completion of the investigation, the complaint committee reviews the information obtained and decides whether to recommend dismissal or prosecution of the complaint before the board. The committee must believe that there is a good reason to have a hearing under the terms of its statute, rules, and regulations. The committee may also choose to have a conference with the licensee for the purposes of negotiation, education, or conciliation. You should consult your assigned attorney if you have any questions regarding a specific procedure or a particular situation.

F. Form Letters

Samples of the types of letters used during the processing of a complaint and the investigation process are available from your attorney.

XI. HEARINGS

A. Definitions and Applicability of Administrative Procedure Act (APA)

Certain definitions contained within the APA are important in understanding the portion of the APA dealing with hearings. These definitions are as follows:

- (1) Agency: each board, commission, department, officer, or other authority of the state, whether or not within, or subject to review by, another agency.
- (2) Party: any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding.
- (3) Order: the final disposition of an agency in any matter other than rule making in which the agency is required by law to make its determination after notice and hearing.
- (4) Adjudication: the agency process for the formation of an order.
- (5) License: includes any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.
- (6) Licensing: any agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, or amendment of a license.

B. General Procedure

Section 25-15-208(a)(1) and (2) of the APA requires that all parties receive an opportunity for hearing after reasonable notice. That notice shall include the following:

- (1) statement of time, place, and nature of hearing, (2) statement of legal authority and jurisdiction, and (3) a short and plain statement of matters of fact and law asserted.

A licensee or permit holder has the right to certain information under §25-15-208(a)(3). The agency is required to give this information only upon request when the agency seeks to revoke, suspend, or otherwise sanction a license or permit holder. The

information must be provided by the agency or its attorney prior to the adjudicatory hearing. The information that the agency must provide includes: (1) the names and addresses of persons the agency intends to call as witnesses at any hearing; (2) any written or recorded statements and the substance of any oral statements made by the license or permit holder, or a copy of the statement; (3) any reports or statements by experts made in connection with the particular case, including results of physical or mental exams, scientific tests, experiments, or comparisons; and (4) any books, papers, documents, photographs, or tangible objects that the agency intends to use in any hearing or that were obtained from, or belong to, the license or permit holder, or copies of the same. Disclosure is not required of research or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the agency or members of his staff or other state agents.

At the hearing, all parties must have the opportunity to respond and to present evidence and argument on all issues involved. Nothing in the APA prohibits informal disposition by stipulation, settlement, consent order, or default. Corrective and disciplinary action may be accomplished through a consent order or through stipulation setting forth facts and discipline to which the licensee has agreed.

A record of the administrative action is required by Ark. Code Ann. §25-15-208(a)(5). The record shall include: (1) all pleadings, motions, and intermediate rulings; (2) evidence received or considered, including, on request of any party, a transcript of oral proceedings or any part thereof; (3) a statement of matters officially noticed; (4) offers of proof, objections, and rulings thereon; (5) proposed findings and exceptions thereto; and (6) all staff memoranda or data submitted to the hearing officer or members

of an agency in connection with their consideration of the case. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

Subpoenas are governed by Ark. Code Ann. §25-15-208(7). If the agency can issue subpoenas or subpoenas *duces tecum*, then any party, by written request, can have the agency issue the same types of subpoenas on behalf of that party. The authority for an agency to issue subpoenas can be found in its enacting legislation or in Ark. Code Ann. §§17-80-102 and 25-15-104.

Ex parte communications are banned under Ark. Code Ann. §25-15-209 unless they are required for the disposition of *ex parte* matters authorized by law. This applies to members or employees of an agency assigned to render a decision, to make final or proposed findings of fact, or to make conclusions of law in any case of adjudication. Except upon notice and opportunity for all parties to participate, such persons cannot communicate, directly or indirectly, (1) in connection with any issue of fact, with any person or party; and (2) in connection with any issue of law, with any party or his representative. An example of an *ex parte* communication would be a licensee, who was going before a board in a disciplinary proceeding, directly contacting a board member at her home to discuss his case prior to the day of the hearing. If an *ex parte* communication occurs, it should be noted on the record. An agency member may communicate with other members of the agency, and he also may have the aid and advice of one or more personal assistants.

When the agency reaches a decision, Ark. Code Ann. §25-15-210 requires that all parties must be served either personally or by mail with a copy of any decision or order. A final order or decision must be in writing or stated in the record, and it must include

findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submits proposed findings of fact in accordance with agency rules, then the decision must include a ruling upon each of the proposed findings.

An agency cannot make a decision adverse to a party other than the agency unless (1) a majority of the officials of the agency who are to render the decision have heard the case or read the record, or (2) a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who will render the decision. Such a proposal for decision must contain a statement of the reasons therefor and of each issue of fact or law necessary thereto, prepared by the person who conducted the hearing.

There are special rules to be followed regarding hearings on licenses. Ark. Code Ann. §25-15-211 applies when the grant, denial, or renewal of a license is required by law to be preceded by notice and an opportunity for hearing. If there is timely and sufficient application for the license or its renewal, then: (1) it keeps the existing license from expiring until the application has been finally determined by the agency; and (2) if the application is denied or the terms of the new license are limited, it keeps the license from expiring until the last day for seeking review of the agency order or until a later day fixed by the reviewing court.

No negative action against a license is lawful unless the agency gives notice to the licensee of the intended action and the licensee is given a chance to show that he complied with all lawful requirements for retention of the license. An agency can

summarily suspend a license under Ark. Code Ann. §25-15-211(c) if the public health, safety, or welfare imperatively requires emergency action.

Hearing procedures are addressed in Ark. Code Ann. §25-15-213. That section addresses bias on the part of an agency member. The agency, one or more of its members, or a hearing officer shall preside at the hearing, but all presiding officers and officers participating in decisions must behave in an impartial manner. An officer may withdraw from the adjudication process at any time if he deems himself disqualified. Also, any party may file an affidavit “of personal bias or disqualification” regarding an officer. The agency must grant that request if it is timely, sufficient, and filed in good faith.

Pursuant to published procedural rules of the agency, the person presiding over a hearing has the power to do the following: (1) issue subpoenas if the agency is authorized by law to issue them; (2) administer oaths and affirmations; (3) maintain order; (4) rule on all questions arising during the hearing or proceedings; (5) allow discovery by deposition or otherwise; (6) hold conferences for settlement or to simplify issues, (7) make or recommend decisions; and (8) generally regulate and guide the course of the pending proceeding. Also pursuant to published procedural rules of the agency, the agency or presiding officer can apply to circuit court to compel a person to respond to a subpoena, to take an oath or affirmation, to testify, or to obey an agency order.

At a hearing, the burden of proof is on the proponent of a rule or order. Evidentiary standards are different from those in courts. Under Ark. Code Ann. §25-15-213(4), irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Also, any other oral or documentary evidence, not privileged, may be received if it is of a type

commonly relied upon by reasonable, prudent men in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted of record. When a hearing will be expedited and the interests of the parties will not be substantially prejudiced, any part of the evidence may be received in written form. All parties have the right to cross-examine witnesses, and judicial notice is allowed by Ark. Code Ann. §25-15-213(5) & (6).

A hearing officer may preside over the proceedings as noted above. Generally, in this state, for licensing boards, the hearing officer conducts the proceedings and makes evidentiary and procedural rulings, but the board or agency makes the decision. A hearing officer from the Attorney General's Office may be available. If the hearing is not conducted by a board member or a hearing officer from the Attorney General's Office, then the hearing officer should be a licensed attorney.

Generally, the agency's attorney prosecutes the adjudication. However, to preserve his special immunity in the event of a lawsuit, the attorney may not participate in the investigation of any claim.

Persons who must appear before an agency or an agency representative for a hearing or oral testimony have the right to be accompanied and advised by a lawyer. Every person has the right to appear in person or by counsel before the agency at the hearing.

A board can impose sanctions as set forth in its statutes. In addition, Ark.Code Ann. §25-15-217 (Supp. 2001) provides that each agency with the authority to suspend, revoke, or deny a license for acts or omissions, or other conduct as provided by law, may impose alternative sanctions as set forth in subsection (b) of the statute. Some of the

alternative sanctions found in subsection (b) include the ability to: (1) impose a monetary penalty not to exceed five hundred dollars for each violation; (2) require that the person complete appropriate education programs; (3) require that the person complete licensing or credentialing examinations; (4) place conditions or restrictions upon the regulated activities of the holder of the license; and (5) take other action that would be appropriate, which would achieve the desired disciplinary purposes but not impair the public health and welfare. Finally, it should be noted that some boards have the authority to sanction persons who practice without a license; others do not have that authority.

Under Ark. Code Ann. §25-15-214, any person can bring suit in circuit court if she thinks she is injured by an agency's unlawful, unreasonable, or capricious failure, refusal, or delay in acting.

XII. ADMINISTRATIVE APPEALS

A. Generally

Judicial review, or administrative appeal, is governed by Ark. Code Ann. §25-15-212, a part of the Administrative Procedure Act. Judicial review is granted to any person injured in “person, business, or property” by final agency action. The request for review is made by filing a petition within 30 days after service of the final decision. The petition may be filed in either the circuit court in the county where the petitioner resides or does business or in the Pulaski County circuit court. Copies of the petition must be served upon the agency and other parties of record in accordance with the Arkansas Rules of Civil Procedure. The court has discretion to allow other interested persons to intervene in the judicial review.

B. Stay of Enforcement of Agency Decision

The filing of a petition for appeal does not automatically stay enforcement of the agency’s decision. Either the agency or the reviewing court may stay enforcement on just terms. When the decision is an order from a healing arts board, the reviewing court, only after notice and hearing, may postpone the effective date of an action or preserve the status and rights of the parties pending review of the decision.

C. The Record on Judicial Review

The agency must file the entire record within 30 days after service of the petition for review. The time for filing the record can be extended by the court, but for no longer than a total of 90 days. The agency must file the original record or a certified copy. The cost of preparation of the record is borne by the agency, but the cost “shall” be recovered from the appealing party if the agency wins the appeal. The record consists of the items

listed in Ark. Code Ann. §25-12-208(a)(5). The record can be shortened by stipulation of all parties, and any party who unreasonably refuses to stipulate to limit the record may be taxed for the additional costs. The court can require or allow corrections or additions after the record is filed.

If review proceedings are instituted in two or more courts regarding the same order, the agency shall file the record in the court where the first action is filed. The other courts then transfer the remaining proceedings to the court where the record has been filed.

D. Presentation of Additional Evidence on Judicial Review

Additional evidence beyond the record may be presented to the agency upon motion only if the court finds that the evidence is material and that there were good reasons for failure to present it in the proceedings before the agency. The agency may modify its findings and decision by reason of the additional evidence, then file that evidence and any modifications, new findings, or decisions with the reviewing court. The circuit court reviews the case without a jury, and review is limited to the record, except that in cases of alleged irregularities in procedure before the agency that are not shown on the record, the court may take testimony. Upon request, the court must hear oral argument and receive written briefs in a judicial review proceeding.

E. Reversal or Modification of Agency Decision

The reviewing court can generally affirm the agency decision, remand the case for further proceedings, or reverse or modify the decision if the petitioner's substantial rights have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions,
- (2) in excess of the agency's statutory authority,
- (3) made upon unlawful procedure,
- (4) affected by other error or law,
- (5) not supported by substantial evidence in the record, or
- (6) arbitrary, capricious, or characterized by abuse of discretion.

XIII. ADOPTING RULES AND REGULATIONS

A. Purpose of Rules

The authority of any state agency, board, or commission to adopt, amend, or repeal rules is one of its most important tools for establishing and implementing public policy for the State. This section is designed to familiarize members of boards and commissions with the concept of rule making, and to provide board members with practical information relating to the rule-making process and their role during that process. It should also be noted that A.C.A. § 25-15-216 (Supp. 2001) requires that as soon as practicable after each regular session of the General Assembly, each agency shall review any newly enacted laws to determine (1) whether any existing rule should be repealed or amended or (2) any new rule should be adopted.

B. General Process

Rule making by an agency or board is often described as a quasi-legislative function. It is the part of the administrative process that resembles a legislature's enactment of a statute. The term "rule" is defined in the Administrative Procedure Act as any agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of any agency. The term "rule" does not include statements concerning the internal management of an agency or intra-agency memoranda. A.C.A. § 25-15-202(4) (Supp. 2001).

Rule making is a concept designed to relieve the Legislature of the burdensome task of enacting detailed and specialized laws in numerous complex areas for which the Legislature has no expertise. In order for a board or commission to adopt rules, there

must be a statute in effect that grants rule-making authority to the board on a given subject. Any rules adopted by a board must be authorized by statute and must not exceed the scope of, or be in conflict with, the authority granted by the Legislature. Administrative rules are legally binding and have the force and effect of law within the State. Although both statutes and rules are intended to guide or restrict future behavior, rules normally are enforced initially in the administrative arena.

Rule making is a lengthy and involved process. It is not accomplished simply by drafting rules. In fact, rule drafting is usually the first of many steps that must be followed in sequence before rules go into effect. Since each board's attorney advises the board and its staff throughout the process, this section will not attempt to explain the intricate procedures involved. Instead, it will provide board members with only a brief overview. There are three (3) general steps involved in adopting rules: (1) drafting of the rule; (2) adoption of the rule in accordance with the Arkansas Administrative Procedure Act; and (3) filing of the rule.

In order to assist agencies in the rule-making process, A.C.A. § 25-15-215 directs the Attorney General to publish model rules of procedure for use by agencies. Each agency created after the effective date of Act 1648 must adopt those model rules that are practicable.

C. Administrative Procedure Act

The Arkansas Administrative Procedure Act generally governs the adoption of rules by an agency, board, or commission. Pursuant to A.C.A. § 25-15-204, prior to the adoption, amendment, or repeal of any rule, the agency must give at least thirty (30) days notice of its intended action. The notice does not need to contain the entire text of a

proposed rule. The notice must include a statement of the terms or substance of the intended action, or a description of the subjects and issues involved, and the time, the place, and the manner in which interested persons may present their views. The notice must be mailed to any persons specified by law and to all persons who have requested advance notice of rule-making proceedings. The notice must also be published, unless otherwise specified by law, in a newspaper of general daily circulation for seven consecutive days and, where appropriate, in trade, industry, or professional publications that the agency may select. If the length of time for publication is not specified by other law, the publication must run for seven consecutive days. The thirty-day time period begins on the first day of the publication of notice.

The agency must also afford all interested persons a reasonable opportunity to submit written data, views, or arguments, orally or in writing. A hearing must be granted if requested by twenty-five (25) persons, by a governmental subdivision or agency, or by an association having no fewer than twenty-five (25) members. The agency must fully consider all written and oral submissions respecting the proposed rule before finalizing the language of the proposed rule and filing the proposed rule.

It should also be noted that, in certain circumstances, an agency may adopt an emergency rule without following the public-notice requirements. Under the APA, if an agency finds that imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than thirty days notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it may choose. The mere parroting of the statutory phrase regarding "the public health, safety, or welfare" with no specific facts is insufficient to support the

adoption of an emergency rule. An emergency rule may be effective for no more than one-hundred-twenty (120) days. After adopting an emergency rule, the agency should generally begin the regular rule-making process.

D. Filing Rules and Regulations

The following are generally the necessary steps to be taken in order to file rules and regulations. The Assistant Attorney General assigned to the particular agency should be contacted for information regarding the precise steps to be followed.

With regard to proposed rules and regulations, once the board or commission votes to begin the APA process and publish the rule or regulation for public comment, the following must be filed with Legislative Research: (1) two copies of the proposed rule with a cover letter on agency stationery; (2) two copies of the Legislative Council Questionnaire; and (3) two copies of the Financial Impact Statement – regarding the current and next fiscal year. It should be noted that Legislative Research is located in Room 433 of the State Capitol (682-1937) and must have these copies 30 days before the public-comment period ends. As only 30 days is required by statute for the public to comment, these documents generally must be filed with Legislative Research before, or the same day as, your notice is first published. Otherwise, you must extend the time for public comment.

With regard to the filing of adopted rules and regulations, after receiving public comment and after the board or commission has approved a final rule or regulation, the rule or regulation must be filed with Legislative Research, the Secretary of State, and the Arkansas State Library.

Legislative Research requires (1) one copy of the final rule or regulation with a cover letter on agency stationery stating that the attached rule or regulation is a final one; and (2) one diskette containing a copy of the final rules and regulations (preferably in Microsoft Word). The Secretary of State requires (1) two copies of the final rule or regulation; (2) two copies of the Financial Impact Statement; and (3) two copies of the Arkansas Register Transmittal Sheet. In order to publish rules on the Internet, certain agencies may also soon be required to provide the Secretary of State with a diskette containing the agencies' current rules and regulations, including the rule changes. The Arkansas State Library requires two copies of the Agency Certification Form and sixteen copies of the rule or regulation with the Financial Impact Statement (fifteen for the State Library and one for the agency).

Each rule adopted by an agency will be effective ten days after filing unless a later date is specified by law or in the rule itself. An emergency rule may become effective immediately upon filing if the agency finds such an effective date is necessary because of imminent peril to the public health, safety, or welfare. In such a case, the agency's finding and a brief statement of the reasons therefor must be filed with the rule.

Arkansas law provides for legislative review of rules and regulations. This process requires agency participation. See Ark. Code Ann. §10-3-309.

E. Required Forms

The Arkansas Register Transmittal Form is available from the Secretary of State's Office and the Agency Certification Form is available from the State Library.

XIV. EMPLOYMENT ISSUES

A. Employees

The employees of an agency, board, or commission are employees of the State of Arkansas. Most of them are “at-will” employees, which means that they may be discharged at any time for any reason that is not prohibited by law. An employee may not be discharged for an illegal reason, such as race, religion, gender, disability, etc. Also, some employees, particularly some administrators, are not “at-will.” A court may view an agency’s personnel policies and employee handbook as a contract that gives an employee rights beyond “at-will” employment under certain limited situations. You should consult your agency attorney if you need to determine an employee’s status.

There are state and federal laws protecting employees from discrimination based on age, gender, race, religion, and disability. For this reason, it is important for a state agency, board, or commission to follow good personnel policies. The Office of Personnel Management at the Department of Finance and Administration provides general personnel policies and procedures for agencies to use in dealing with employees. Some larger agencies must write additional personnel policies. Any policies adopted by your agency should be reviewed by your attorney for compliance with state and federal laws. Also, most state employees have certain rights in having their grievances heard.

B. State Employees Grievance Appeals Panel

Most state employees may appeal any adverse grievance decision to the State Employee Grievance Appeal Panel (SEGAP). SEGAP was created by executive order of the Governor. Its purpose is to allow for an external, impartial review of a decision by a state agency that adversely impacts an employee and concerns allegations of unlawful

discrimination, termination, suspension without pay, involuntary demotion, or failure to award compensatory time. Your attorney can represent you in SEGAP proceedings.

C. Background Checks

Some state laws require criminal background checks for certain employees. These checks are performed by the Arkansas State Police, and they are paid for by the requesting agency. If your agency is required to perform criminal background checks, the statute should specify a procedure for your agency to deal with appeals and grievances arising from the checks. Your attorney will assist you with those procedures.

D. Drug Testing

Drug testing may only be done under certain specified conditions. If your agency, board, or commission feels that employee drug testing or screening is necessary, you should contact your attorney to discuss the specific policies and procedures that need to be in place for such testing.

E. Whistle Blowers

Ark. Code Ann. §21-1-601 et seq. is the Arkansas Whistle Blower Law. This statute protects employees who, in good faith, report a substantial waste of public funds, property, or manpower or a violation or suspected violation of a state, county, or municipal law, rule, or regulation. In disciplining employees, each state agency, board, and commission must be mindful of this law and follow its procedures before trying to discipline or discharge an employee. You should consult your attorney if an employee of your agency has made a report that may fall under the Whistle Blower Law.

F. Professional Services Contracts

If an agency, board, or commission needs to contract for professional services with a non-state employee, there is a procedure for obtaining and approving such contracts. The law regarding professional services contracts is found at Ark. Code Ann. §19-4-1701 *et seq.* A professional services contract creates an independent-contractor relationship, rather than an employment relationship. The Office of State Procurement can provide you with forms and instructions for contracting for professional services. Your agency attorney can advise you regarding the process.

G. Legal Counsel

You should consult your assigned attorney if you have general questions regarding employment law or specific questions regarding a particular employment issue.